UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

AMALIA RAMIREZ CASTELANO, *et al.*, on their own behalf, and on behalf of all others similarly situated,	)	CA M-08-057
PLAINTIFFS-PETITIONERS,	)	(Class Action)
v.	)	
HILLARY RODHAM CLINTON, Secretary of State, *et al.*,	)	
DEFENDANTS-RESPONDENTS.	)	

UNOPPOSED MOTION TO APPROVE ATTORNEYS' FEES AND EXPENSES PURSUANT TO THE TERMS OF THE STIPULATION AND AGREEMENT

Pursuant to Fed. R. Civ. P. 23(h) and 54(d)(2), Plaintiffs Amalia Ramirez Castelano, Sofia Elizabeth Lopez, and J.S., a minor by and through his next friend Sonia Raquel Cantu-Sanchez (collectively, the "Plaintiffs"), hereby move this honorable Court to approve that portion of the Stipulation and Agreement of Settlement and Release ("Settlement Agreement") in which the parties agree to settle in full all claims for attorneys' fees, expenses, and costs with Defendants' payment of the amount of $150,000.00 to Class Counsel. This class action has resulted in a settlement that delivers significant benefits and relief to the putative class, including substantial changes in Defendants' practices and procedures applicable to the adjudication of certain passport applications. The settlement also provides for the payment by Defendants of $150,000.00 in attorneys' fees and expenses to Class Counsel.[1] *See* D.E. 89, Exhibit 1, at ¶ 89.

[1] Plaintiff's Counsel includes: Hogan & Hartson LLP; Lisa S. Brodyaga, Esq. on behalf of Refugio del Rio Grande, Inc.; the American Civil Liberties Union Racial Justice Program; and the American Civil Liberties Union of Texas.

According to the terms of the agreement, this payment fully satisfies any and all claims for attorneys' fees and costs, and Plaintiffs do not seek any additional fees, expenses, or costs under the Equal Access to Justice Act or otherwise.

Defendants do not oppose Class Counsel's motion to the extent that the amount is consistent with the terms provided for in the Settlement Agreement and does not exceed $150,000.00. Further, the Parties agree that any change in the amount of fees, expenses and costs contrary to paragraph 89 would constitute a material modification pursuant to paragraph 86 that would then void the agreement. *Id.* ¶ 86.

As demonstrated below, Class Counsel's unopposed request is fully consistent with the law of this District and entirely reasonable, considering the complexity of this case, the substantial work invested to litigate and ultimately negotiate a settlement, and the significant benefits and relief provided to the putative class as a result. For these reasons, Plaintiffs respectfully request that the Court grant the motion and approve the payment of $150,000.00 in attorneys' fees, expenses, and costs to Class Counsel as provided in the Stipulation.

BACKGROUND

Class Counsel brought this action on behalf of Plaintiffs and the class alleging that the U.S. Department of State (the "Department") engaged in a policy, pattern, and practice of applying heightened scrutiny to a class of passport applicants whose births in Southwest border states were attended by midwives or birth attendants, or whose citizenship was claimed through a parent whose birth in a Southwestern border state was attended by a midwife or birth attendant. *See* Sec. Am. Compl. ¶ 5. Plaintiffs alleged that these passport applicants were subjected to excessive demands that went beyond what other applicants were required to follow and that, even after applicants responded to the demands, Defendants, without a proper individualized, evidence-based adjudication of the merits of each application, deemed their applications "filed without further action" or otherwise abandoned and closed and refused to issue them passports. *See id.* ¶¶ 7-8. Plaintiffs asserted claims under the Fifth Amendment for violations of due process and equal protection, the Administrative Procedure Act, 28 U.S.C. § 1361, and 28 U.S.C. §§ 2201-2. *See id.* ¶¶ 196-211. By their second amended complaint, filed on September 16, 2008, Plaintiffs sought declaratory, injunctive, and mandamus relief on behalf of themselves and a proposed class. *See id.* at 53-54 (Prayer for Relief). Plaintiffs also raised claims individually under 8 U.S.C. § 1503(a). *Id.* ¶¶ 212-13. Plaintiffs recently moved to sever these individual claims, and the motion was granted by the Court. *See* D.E. 88; D.E. 91.

Overview of the Legal Work Class Counsel Performed in this Case

In pursuing this class action, Class Counsel engaged in substantial pre-trial litigation and discovery, as well as considerable settlement-related activities. Specifically, Class Counsel spent significant time working on necessary tasks common to class action litigation, including:

- Case evaluation: assessing the strengths and weaknesses of the case prior to and after filing the complaints;
- Preparation of the amended complaints: drafting the complaints, conducting legal and factual research;
- Motion practice: drafting an opposition to defendants' partial motion to dismiss; drafting a motion to compel and a motion for preliminary injunction;[2]
- Legal research: researching and drafting legal memoranda on multiple issues arising out of the litigation;
- Factual investigation: interviewing class members and potential class members as well as other factual development;

[2] As a result of the settlement in this matter, the motion to compel and motion for preliminary injunction were not filed.

- Case management: meeting and corresponding with co-counsel and defense counsel;

- Discovery: review and analysis of documents produced by defendants and to be produced to defendants; responding to numerous sets of interrogatories, requests for production and requests for admission; drafting interrogatories and requests for production;

- Settlement negotiations: Preparation for and attendance at numerous settlement conferences and months of settlement negotiations, drafting and revising the settlement agreement, and drafting all necessary motions and other papers to accompany the settlement; and

- Post-settlement work: preparation of notice and other documents to be sent to class members.

See Decl. of Adam K. Levin in Support of Unopppposed Motion to Approve Attorneys' Fees and Expenses Pursuant to the Terms of the Stipulation and Agreement, at ¶¶ 7-13 (Exh. 1) ("Levin Aff.").

Class Counsel has invested substantial hours in the case. The amount of work that Class Counsel performed was necessitated by the June 1, 2009 effective date of the final phase of the Western Hemisphere Travel Initiative (WHTI). The WHTI deadline made the swift resolution of the case – whether by trial or settlement – particularly compelling and required extensive resources to get the case in a position where resolution would be possible.

The parties negotiated for a complete and full payment of $150,000.00 in fees and expenses, to Class Counsel to be divided among co-counsel by agreement, for all their fees, expenses and costs. The payment of attorneys fees and expenses will be made directly by Defendants and does not impact the benefits provided to the class. Plaintiffs and Class Counsel believe this amount is reasonable.

The Settlement

After months of extensive settlement discussions, the parties negotiated a settlement agreement that would dispose of the action. The Parties have submitted the Stipulation and Agreement of Settlement and Release (the "Settlement Agreement") for the Court's approval. *See* D.E. 89, Exh. 1.

The Agreement confers significant benefits on the class. The key terms of the Settlement Agreement include the following:

- Class Members who did not receive a passport may re-apply without paying the passport application fee again, as long as they complete a claim submission process within the proper deadlines. They may also avoid the $25 passport execution fee if they re-apply at a Passport Agency/Center or at one of the five temporary mobile units the State Department agreed to provide in southern Texas. *Id.* ¶¶ 30-33;

- The State Department will revise and reinforce its standards for maintaining and using a list of midwives and birth attendants convicted or suspected of engaging in birth certificate fraud in the passport application review process. *Id.* ¶ 53;

- The State Department will no longer send "filed without further action" letters or designate passport applications as "abandoned" or otherwise closed. As part of a series of new procedures designed for Class Members and others, Class Members' passport applications will either be approved and a passport issued, or denied by the Department, unless withdrawn in writing by the Class Member. *Id.* ¶ 25;

- The State Department will improve its procedures for communicating with Class Members when requesting additional information, and in those instances where an application is being denied. *Id.* §§ C & D;

- The State Department will provide additional training to its personnel to explain, communicate, and reinforce adherence to the appropriate standards and policies for reviewing passport applications. *Id.* ¶¶ 54-57;

- The State Department will establish a review process so that Class Member re-applications will be initially reviewed by a senior-level employee specially trained by the Department. In those instances where a passport is not issued at this stage, a three-member panel made up of senior-level employees will then review the entire application and make the decision to approve the application and issue a passport or deny the application. *Id.* ¶¶ 34-52; and

- Class Members who are denied passports will have an additional sixty days to respond to the specific reasons for the denial of their application. The three-

> member panel will review any such responses and additional information before making a final decision. *Id.* ¶ 45.

The Court orally granted preliminary approval to the settlement on July 1, 2009, setting a fairness hearing for August 14, 2009. With final approval of the Settlement Agreement, these terms will provide class members with the opportunity to re-apply, fee-free, and have their applications adjudicated under these procedures and standards.

ARGUMENT

I. THE COURT SHOULD APPROVE CLASS COUNSEL'S REQUEST FOR ATTORNEYS' FEES AND COSTS OF $150,000.00.

Pursuant to Fed. R. Civ. P. 23(h), this Court "may award reasonable attorney's fees and nontaxable costs that are authorized . . . by the parties' agreement." Courts encourage litigants in the class action context to resolve fee issues by agreement. *See, e.g.*, *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 322 (W.D. Tex. 2007). "Accordingly, courts are authorized to award attorneys' fees and expenses where all parties have agreed to the amount, subject to court approval, particularly where the amount is in addition and separate from the defendant's settlement with the class." *Id*. Here, the parties have agreed to a payment of $150,000.00 in attorneys' fees and costs to be paid by Defendants and distributed among Plaintiff's Counsel by agreement. This payment is separate and apart from the class settlement for injunctive and declaratory relief and does not, in any way, diminish the class settlement. Plaintiffs submit that such an amount is reasonable.

The Fifth Circuit requires courts in this district to use the "lodestar method" to assess the reasonableness of attorneys' fees awards in class action lawsuits. *Id.* at 323. This method is particularly appropriate "where the value of the settlement is difficult to ascertain." *Strong v. BellSouth Telecomms., Inc.*, 137 F.3d 844, 852 n.5 (5th Cir. 1998). The lodestar methodology requires the Court to consider "the reasonable number of hours expended on litigation and the reasonable hourly rates for the participating attorneys." *Id.* at 850 (citations omitted). "The lodestar is [then] computed by multiplying the number of hours reasonably expended by the reasonable hourly rate," and, if necessary, reviewing the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974), to adjust the lodestar. *Strong*, 137 F.3d at 850. The twelve *Johnson* factors are:

> (1) the time and labor required, (2) the novelty and difficulty of the issues, (3) the skill required to perform the legal services properly, (4) the preclusion of other employment, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases.

Id. at 850 n.4.

Where, as here, the parties have agreed to a fee payment that is below the lodestar amount, courts have held that the *Johnson* factors are not applied to increase or decrease the amount. *See, e.g., Quintanilla v. A & R Demolition Inc.*, No. H-04-1965, 2007 WL 5166849, at *7 n.3 (S.D. Tex. May 7, 2007). However, for purposes of completeness, Class Counsel has set forth an analysis of the *Johnson* factors.

Class Counsel may also recover expenses that are authorized by the settling parties' agreement. Fed. R. Civ. P. 23(h); *DeHoyos*, 240 F.R.D. at 322. Expenses that were "reasonably and necessarily incurred in prosecuting this action and achieving the proposed Settlement" are recoverable. *Schwartz v. TXU Corp.*, No. 3:02-cv-2243-K, 2005 WL 3148350, at *34 (N.D. Tex. Nov. 8, 2005).

A. The Hours Worked Are Reasonable.

In assessing the lodestar, this Court must "determine the number of hours that were reasonably expended on the litigation." *Quintanilla*, 2007 WL 5166849, at *7. Here, the number of hours for which Class Counsel seeks payment is eminently reasonable given the complexity of the case, the results achieved, and the extraordinary amount of additional work for which Class Counsel is not seeking payment.

Class Counsel collectively incurred approximately 4,069 attorney and paralegal hours over the course of this litigation. *See* Levin Aff. ¶¶ 15-17. Obtaining the type of socially beneficial and wide-spread injunctive relief that Class Counsel was able to obtain here and litigating against a formidable opponent, the U.S. Government, was a difficult and lengthy challenge. Levin Aff. ¶¶ 7-14. It was made even more costly because so much work had to be completed before the WHTI deadline. According to the declaration of Class Counsel, the hours incurred in this case were reasonable. Levin Aff. ¶ 18; *see also DeHoyos*, 240 F.R.D. at 325 ("[C]lass [C]ounsel lacked incentives to use resources needlessly given the cost of investing money in lawsuits and the gamble taken over an uncertain result.").

B. The "Lodestar" Is Reasonable, Particularly In Relation To The Success Achieved.

In assessing the lodestar, the Court must determine the reasonable hourly rate for Class Counsel's work. "The prevailing market rate for similar services by similarly trained and experienced lawyers in the relevant legal community is the established basis for determining a reasonable hourly rate." *Quintanilla*, 2007 WL 5166849, at *7.

In a similarly complex class action, which "reflect[ed] the level of expertise and staffing mix required to achieve success in the face of the effort required and the complexity of that specific case," the blended rate was $457 per hour. *In re Enron Corp. Sec., Deriv. & ERISA Litig.*, 586 F. Supp. 2d 732, 805 (S.D. Tex. 2008), quoting *Fisher Scientific Int'l, Inc. v. Modrovich*, No. Civ. A. H-03-0467, 2005 WL 3348901, at *10 (S.D. Tex. Dec. 8, 2005). The blended rate of $457 per hour was approved by the court. *See generally In re Enron Corp. Sec, Deriv. & ERISA Litig., 586 F. Supp. 2d.*

Here, Class Counsel agreed to accept only $150,000.00, which results in an average hourly rate of approximately $37.00 per hour. This rate is exponentially less than the prevailing market rates in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation. *See In re Enron Corp. Sec., Deriv. & ERISA Litig.*, 586 F. Supp. at 780 (citing to table based on *The National Law Journal*'s annual surveys of firm billing rates in Texas). For comparative purposes, the blended rate represents over a seventy percent reduction from the rate that counsel would be entitled to assuming the Equal Access to Justice Act applied, which provides for an hourly rate of $125.00. *See* 28 U.S.C. § 2412(d)(2)(A)(ii). Thus, based on any comparison, Class Counsel's request for approval of a payment of attorneys' fees and costs totaling $150,000.00 is entirely reasonable and warranted.

C. The Lodestar Substantially Exceeds the Fees Class Counsel Seeks.

As discussed above, Class Counsel's fees are reasonable using the lodestar method and, indeed, any method. Class Counsel agreed to accept $150,000.00 in fees and expenses. Using the blended average of $457 that was approved in *In re Enron*, Class Counsel's agreement represents **8%** of the total fees billed by Class Counsel. This represents a lodestar of 0.08. A request for fees and expenses that results in a lodestar of less than 1.0 is strong evidence that the request is reasonable. *See, e.g., Quintanilla*, 2007 WL 5166849, at *8 (approving fee award provided by settlement agreement where award resulted in reduction in actual fees incurred);

Vista HealthPlan, Inc. v. Warner Holdings Co. III, Ltd., 246 F.R.D. 349, 364-65 (D.D.C. 2007) ("Class counsel is requesting attorneys' fees that are less than their lodestar without any multiplier, which serves as further evidence of the reasonableness of their attorneys' fee request.").

D. Adjustment of the Lodestar Under the *Johnson* Factors.

Where, as here, the parties have agreed to a payment that is below the lodestar amount, the *Johnson* factors are not applied to increase or decrease the amount. *Quintanilla*, 2007 WL 5166849, at *7 n.3. However, for purposes of completeness, Class Counsel has set forth an analysis of the *Johnson* factors, which reinforce the conclusion that approving the full $150,000.00 in fees and expenses is reasonable.

1. The time and labor involved.

Although the time and labor involved factor is generally subsumed in the lodestar, *see DeHoyos*, 240 F.R.D. at 326, here the lodestar is based on the amount of work invested in the case as of May 2009. It is worth noting that Class Counsel has incurred additional fees and expenses since that time, and will incur additional fees and expenses in the future as a result of effecting the terms of the Stipulation and Agreement of Settlement and Release. Levin Aff. ¶ 14. Accordingly, this factor justifies the current lodestar. *DeHoyos*, 240 F.R.D. at 327.

2. The novelty and difficulty of the questions.

This litigation presented challenging legal issues to the Court and the parties, requiring a substantial amount of work by Class Counsel. The case presented complex questions of constitutional and administrative law, as well as disputed discovery issues concerning the applicability of various government privileges, such as the law enforcement privilege and the deliberative process privilege. Levin Aff. ¶¶ 9 and 11. Not only did these issues require research and analysis, but they were also briefed for various motions, such as the motion to dismiss. Levin Aff. ¶ 9.

At the very least then, the issues raised in this case were sufficiently complex that this factor does not call for a downward adjustment in the lodestar.

3. The skill required to perform the legal services properly.

Each of the attorneys representing the putative class brought special expertise. Ms. Brodyaga brought decades of experience regarding immigrant rights and experience regarding the interactions between immigrants and the government. Levin Aff. ¶ 4. The attorneys from the ACLU have participated in numerous large civil rights class actions and have extensive experience litigating complex civil litigation matters. Levin Aff. ¶ 5. The attorneys from Hogan & Hartson have similar experience in complex civil litigation and civil rights cases and combined the resources of an international law firm with the commitment of firm lawyers who are devoted to public interest work. Levin Aff. ¶ 3. Because of counsel's efforts, further expense in prolonging and completing litigation was avoided in favor of an amicable resolution. Levin Aff. ¶ 21. Class Counsel submits that the quality of the work they performed in this matter demonstrates that they had the skill and experience necessary to properly perform the legal services required in this matter.

4. The preclusion of other employment by the attorneys due to the acceptance of this case.

Class Counsel expended a substantial amount of time on this case: more than 4,069 hours since August 2008. Levin Aff. ¶¶ 15-17. As a result of their work on this case, Class Counsel invested resources in this case that could have been used in litigating other civil rights actions on behalf of other worthy plaintiffs. Levin Aff. ¶ 19. In addition, Class Counsel incurred all fees and costs out-of-pocket, with no guarantee of any recovery. Levin Aff. ¶ 19. A "substantial risky financial commitment supports use of a multiplier," *In re Enron*, 586 F. Supp. 2d at 790, but, at the very least, no downward departure from the lodestar is justified here.

5. The customary fee.

Courts have held that this factor is subsumed within the lodestar. *DeHoyos*, 240 F.R.D. at 326. "The customary fee in civil rights and other socially valuable cases is often higher than in other cases." *Id.* at 328 (internal citations omitted). Moreover, given the nature of the relief in this case (injunctive and declaratory rather than monetary) and the fraction of the fees and expenses incurred being sought by Class Counsel, the customary fee would be at least the lodestar for this matter.

6. Whether the fee is fixed or contingent.

Class Counsel undertook this representation on a *pro bono* basis and bore 100% of the financial risk. This Circuit has held that "allowable fees and expenses may not be reduced because appellants' attorney was employed or funded by a civil rights organization and/or tax exempt foundation or because the attorney does not exact a fee." *Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974). Here, the $150,000.00 that Class Counsel agreed to accept represents **only about 8%** of the fees and expenses that Class Counsel would have incurred under a reasonable fee rate. *See In re Enron Corp. Sec., Deriv.*, 586 F. Supp. 2d at 805.

7. Time limitations imposed by the client or the circumstances.

In this Circuit, "[p]riority work that delays the lawyer's other legal work is entitled to some premium." *Johnson*, 488 F.2d at 718. As previously discussed, the WHTI deadline imposed an urgency in completing the necessary legal work in this case. As a result of the WHTI deadline, Class Counsel expended extensive resources to prepare the case to a point where resolution – whether through litigation or settlement – would be possible. This factor certainly would not warrant a downward departure from the lodestar here.

8. The amount involved and the results obtained.

Class Counsel believes they have obtained an excellent result that is fair and reasonable for the putative class. Levin Aff. ¶ 20. The result includes significant changes in the practices and procedures in adjudicating certain passport applications by Defendants. *See generally* D.E. 89, Exh. 1. Courts focus not only on monetary gains, but also on extraordinary non-monetary results obtained by settlements in civil rights cases such as this. *DeHoyos*, 240 F.R.D. at 331 (internal citations omitted). As a result, this factor similarly would support the requested fees.

9. The Experience, Reputation and Ability of the Attorneys.

Here, the experience, reputation, and ability of the attorneys support at least the lodestar figure. Ms. Brodyaga is a well-known and well-regarded immigration lawyer in South Texas who brought decades of experience regarding immigrant rights to the case. Levin Aff. ¶ 4. The attorneys from the ACLU, a national organization with a well-known reputation for defending and preserving the individual rights and liberties guaranteed by the Constitution and laws of the United States, have participated in numerous large civil rights class actions and have extensive experience litigating complex civil litigation matters. Levin Aff. ¶ 5. Hogan & Hartson is a well-known and well-regarded law firm that has been a fixture in the Washington, D.C. legal community, and the Washington, D.C. *pro bono* legal community in particular, for decades. Levin Aff. ¶ 3. Hogan & Hartson has both a national and international presence, and its *pro bono* commitment is similarly strong around this country and the world.

Class Counsel brings to the case experience, reputation and ability commensurate with the rates they charge – and here, are accepting a small fraction of that amount. This factor supports approving the requested amount.

10. The undesirability of the case.

"[F]actors already discussed[,] such as the financial burden on counsel and the demands of handling a class action of the size and complexity of this case, may cause a case to be considered 'undesirable.'" *DeHoyos*, 240 F.R.D. at 332 (internal citations omitted). Furthermore, this case was challenging due to its breadth, its complex legal issues, its time pressures, and its uncertain result. Levin Aff. ¶¶ 8, 18-19. Thus, the lodestar is appropriate.

11. The nature and length of the professional relationship with the client.

Hogan & Hartson, the American Civil Liberties Union National Office, and the American Civil Liberties Union of Texas have no relationship with the class representatives apart from this litigation. Lisa S. Brodyaga, Esq. represented the class representatives individually prior to involvement by Plaintiffs' other counsel. Overall, this factor has a neutral impact.

12. Approved Attorneys Fees and Costs in Similar Cases.

"The range of multipliers on large and complicated class actions have ranged from at least 2.26 to 4.5." *DeHoyos*, 240 F.R.D. at 333 (internal citations omitted). Moreover, as discussed above, civil rights and discrimination cases generally call for increases in attorneys' fees awards. Here, the requested amount is *below* the lodestar. Because it is not customary for class counsel to receive an award reflecting a multiplier of less than 1.0, reducing the payment here is not warranted. *DeHoyos*, 250 F.R.D. at 333-34 (examining lodestar multiples in other complex, civil rights and/or class actions).

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that this Court approve payment to Class Counsel of $150,000.00 in attorneys' fees, costs, and expenses pursuant to the terms of the Settlement Agreement.

Respectfully submitted,

________/s/_____________________

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Dated: July 6, 2009

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2009, I electronically filed the foregoing Unoppposed Motion to Approve Attorneys' Fees and Expenses Pursuant to the Terms of the Stipulation and Agreement with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel for Defendants:

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